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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 568

CHARLES EDWARD ANDERSON BERRY,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled cause on October 27, 1961.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed in the Appendix, infra, p. 15.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 27, 1961 (Appendix, infra, p. 22). The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254 (1).

QUESTIONS PRESENTED.

(1) Whether, in a federal criminal prosecution for a felony in which the government's case is based predominantly on the testimony of one witness, it is error for the trial court to refuse to make a private inspection of the minutes of the grand jury testimony of that witness to ascertain if it contains any inconsistencies or impeaching matter which should be made available to the defense, particularly when the defense counsel has made a specific and timely request during the trial for such private inspection by the court.

(2) Whether the defendant in a federal felony prosecution must first make a showing that inconsistencies or impeaching matter probably exist in the grand jury testimony of the chief prosecuting witness, before the trial court has the duty to make a private inspection of the grand jury transcript after a specific and timely request by the defendant.

(3) Whether the requirement of showing "a particularized need", as established in **Pittsburgh Plate Glass v. United States**, 360 U. S. 395, is necessary where the defendant in a felony prosecution does not demand the right to inspect the grand jury transcript, but only asks that the trial court privately examine the grand jury testimony of the chief prosecuting witness to ascertain if it contains any inconsistencies or impeaching matter which should be made available to defendant.

STATUTE INVOLVED.

United States Code, Title 18, Section 2421:

> "Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice;
>
> . . . . . .
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

STATEMENT.

The petitioner was convicted by a jury on a single count indictment charging him with knowingly transporting a female from El Paso, Texas, to St. Louis, Missouri, for purposes of debauchery and other immoral practices, in violation of Title 18, United States Code, Section 2421. Petitioner was sentenced to imprisonment for three years and a fine of $5,000.00 (R. 395). On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the judgment (Appendix, infra, p. 22).

Petitioner is a professional entertainer of considerable reknown, having made numerous successful recordings, radio and television appearances, several movies, and many personal appearance tours (R. 227). It was on such a tour that he met the female in question in Juarez, Mexico, located across the river from El Paso, Texas, on December 1, 1959 (R. 15). This female, the chief prose-

cuting witness, testified that her name was Janice Norine Escalanti but that she also used the name of Heba Norine (R. 56), and that she was living in El Paso at that time (R. 58). Both the government and the defense evidence showed, without contradiction, that this female then accompanied petitioner and his group of three musicians, in petitioner's automobile, on the remainder of the tour through some six states and terminating at St. Louis, Missouri, where petitioner lived and had his office and business (R. 25-44, 233). The issue in the case, therefore, was the motive or purpose of the interstate transportation; petitioner denied any immoral purposes and insisted the only reason he brought her to St. Louis was to employ her in petitioner's night club as a check-room attendant (R. 233).

The government's case was based almost entirely on the testimony of the alleged victim, who testified at great length at the trial. She admitted that in El Paso petitioner had offered her the night club job, which was the only expressed reason for her coming to St. Louis (R. 21, 69); she also stated that she accompanied the group on the remainder of the tour only as a means of getting to St. Louis, since she had no funds (R. 69). She worked at each performance on the tour (except one or two) selling photographs for petitioner (R. 70), and actually was employed in the night club in St. Louis as the check-room girl (R. 46). To support the government's contention of immoral motives, she testified that at various places on the tour and frequently in St. Louis the petitioner had intercourse with her (R. 30, 34, 37, 38, 41, 48). Petitioner, on the other hand, denied ever having any immoral relations with the girl, or any intent to have such relations (R. 244, 246, 257, 264).

At the conclusion of the direct examination of Janice Escalanti, counsel for the defense requested the produc-

tion of any prior statements made by the witness to government agents (R. 54), and in addition requested the trial court to make an *in camera* inspection of her grand jury testimony to ascertain if it contains inconsistencies or impeaching matter, as follows (R. 55-56):

> "(Mr. Silverstein): We also at this time request that the government present to the court for the court's private examination the minutes and the record of this witness' testimony before the grand jury so that the court can ascertain whether or not that record and those proceedings contain any testimony which——
>
> The Court: Will the jury please file out?
>
> (Whereupon, the following proceedings were had out of the presence and hearing of the jury):
>
> The Court: With respect to the grand jury, the motion will be overruled. With respect to the statements it will be sustained. You can furnish him the statements.
>
> Mr. Silverstein: Going back to my request for the grand jury minutes, I request that they be delivered to the court for the court's examination in camera for a determination by the court as to whether or not these proceedings contain any matters which conflict or which are contradictory to the witness' testimony here in court, and I want the record to clearly show that we are not requesting at this time for the counsel for the defense to have an opportunity to examine the grand jury proceedings, only that they be presented to the court for the court's examination to ascertain if there is any impeaching or contradictory matter therein.
>
> The Court: I will sustain the motion with respect to the statements that they have that she signed or a memorandum of anything they may have given the

FBI. Insofar as the request to inspect the grand jury minutes is concerned, be overruled."

The cross-examination of this witness elicited many contradictions, of varying degrees of importance (R. 74-76, 82, 83, 94-96, 109-110).

Thereafter, counsel for defense repeated his request for a private inspection by the court of the grand jury testimony (R. 178):

> "At this time I would simply like to renew the request that I made yesterday that the government be ordered to produce for the court's inspection in camera the testimony of the witness, Janice Escalanti, before the grand jury, because during her cross-examination yesterday and this morning there have been brought out many contradictions in her testimony and between her testimony and statement that she has given to the F. B. I., and testimony that she had given in the first trial of this cause, and I think, as a matter of fact, that these many contradictions existing further amplifies the necessity to assure a fair trial for the defendant, that the grand jury testimony of this witness be examined by the court to ascertain if there is any impeaching matter therein, and if there is, then that impeaching matter only be furnished to counsel for the defense."

Again the request was overruled, the trial court stating (R. 179):

> "Request will be denied. I realize, of course, that all you criminal lawyers want to get ahold of what goes on in the grand jury room, but I don't understand, with the exception of perjury, that it is a matter that you're entitled to. As a matter of fact, I don't even know whether the grand jury testimony

here was written up. Wouldn't make any difference as far as my ruling is concerned, whether it was or wasn't. Furthermore, I'm not going to set myself up as passing on the testimony before anybody. If you're entitled to it, you're entitled to see it yourself, it's not up to me to tell you what it is, and in my opinion you're not entitled to it."[1]

The other facts elicited at the trial are not germane to this petition. On appeal before the Eighth Circuit, the refusal of the trial court to examine the grand jury transcript was extensively argued by both sides, as reflected in the opinion (Appendix, infra, p. 16). The Court of Appeals held that "no compelling necessity for the examination by the court, privately or otherwise" was shown; that since the interstate transportation was not controverted, the only issue was immorality; and that obviously no indictment would have been returned unless the witness had testified before the grand jury that she had immoral relations with Berry. Therefore, concluded the appellate court, there is no reason to believe that the grand jury testimony would have differed in any material respect from the trial testimony. The Court's opinion noted, without comment, various decisions of the Second Circuit Court of Appeals which are diametrically opposed to the instant holding.

---

[1] Although the government counsel made no comment at the time, it was well known by both counsel that the grand jury testimony was actually already reduced to writing. At a prior trial of this same cause (No. 10,446 in Eighth Circuit, R. 44) same government counsel stated that he did have the grand jury transcript; and in oral argument before the Court of Appeals on the issue, the government admitted it had the transcript of the grand jury testimony at all times.

REASONS FOR GRANTING THE WRIT.

1. The instant case presents the precise issue which this Court noted but refused to consider, because it was not properly raised at the trial, in **Pittsburgh Plate Glass Co. v. United States**, 360 U. S. 395. There the defendant insisted on the unqualified right to have the grand jury records furnished to it for use on cross-examination, a right which is certainly conditional upon the prior showing of a "particularized need", **United States v. Procter & Gamble**, 356 U. S. 677. In the alternative, defendant claimed the trial court should have privately examined the transcript, although no such request was made at the trial. Commenting on this contention, the opinion of this Court observed (360 U. S., at p. 401):

> "The Court of Appeals apparently was of the view that even if the trial judge had been requested to examine the transcript he would not have been absolutely required to do so. It is contended here that the Court of Appeals for the Second Circuit has reached a contrary conclusion. United States v. Spangelet, 258 F. 2d 338. Be that as it may, resolution of that question must await a case where the issue is presented by the record."

It thus appears that this court is cognizant of the importance of this issue but could not resolve it in the **Pittsburgh Plate Glass** case because of the record deficiency. This is further borne out by the fact that, at the very next opportunity by this Court to pass on the issue, certiorari was granted, **Travis v. United States**, 363 U. S. 801. However, when that case was submitted on the merits, it was reversed because of improper venue and a consideration of the procedural issue concerning inspection of the grand jury minutes was therefore precluded, **Travis v. United States**, 364 U. S. 631. The language of the Court

in the **Pittsburgh Plate Glass Co.** case, together with the grant of certiorari in the **Travis** case (in which the Court of Appeals unequivocally held that it was not mandatory for the trial court to make an *in camera* inspection when requested) has led the bench and bar of the nation to the obvious conclusion that the Supreme Court considers this matter of private inspection by the trial court as a vital but unsettled issue which it must ultimately resolve in order to insure fair and uniform criminal procedure throughout the land. The instant case squarely presents this issue for decision; no other matters are raised in this petition. Indeed, if certiorari is now denied and the Eighth Circuit decision allowed to stand, even greater uncertainty will result. The careful distinction drawn in **Pittsburgh Plate Glass Co.** leaves the clear impression that the present issue is one which must be settled by the nation's highest tribunal; lower courts, faced with this very problem in almost every criminal trial, are undoubtedly awaiting the final answer.

2. The decision and opinion of the Eighth Circuit below is in direct and irreconcilable conflict with numerous decisions of the Second Circuit. For many years the latter appellate court has held, without exception, that upon a proper defense request the trial court has a **duty** to make an *in camera* inspection of the grand jury testimony of a principal government witness to ascertain if impeaching matter is contained therein which should be made available to the defense. This rule was carefully described in **United States v. Spangelet**, 258 F. 2d 338 (2nd Circ.), wherein it was clearly explained that such a procedure is wholly independent of the so-called "Jencks statute," 18 U. S. C. A., § 3500, or the holding in **Jencks v. United States**, 353 U. S. 657, neither of which authorizes or prohibits the *in camera* inspection. This decision has been followed and reaffirmed many times in the Second Circuit:

United States v. Zborowski, 271 F. 2d 661; **United States v. McKeever**, 271 F. 2d 669; **United States v. Hernandez**, 282 F. 2d 71 (rehearing denied, 290 F. 2d 86); **United States v. Giampa**, 290 F. 2d 83; **United States v. Santore**, 290 F. 2d 51. In each instance, these opinions declared, either by way of direct holding or dictum, that it is reversible error for the trial court to refuse to make a requested private inspection.

The opinion of the Eighth Circuit herein is based primarily on the court's belief that there was no showing that the grand jury testimony in question would likely reveal any material inconsistencies. This, too, is in direct opposition to the Second Circuit decisions. For example, this same contention was raised by the government and emphatically rejected in **United States v. Zborowski**, supra, in the following language:

> "Even if there were no showing of possible inconsistency in the testimony of a witness in a perjury case, or indeed in any case, where the testimony of such witness is the only direct evidence against the defendant and no valid reason for secrecy exists, the court should upon request examine the grand jury minutes of such a witness for possible inconsistencies . . . **It offends all sense of fairness to first require a showing of possible inconsistency preliminary to examination of the minutes by the trial judge**" (Emphasis added). 271 F. 2d, at p. 666.

Subsequently, in **United States v. Hernandez**, supra, after the government had petitioned for a rehearing and urged this very point (that there was no showing of possible inconsistencies) the Second Circuit again unequivocally repudiated the argument:

> "For neither defendant nor his counsel has the grand jury minutes (indeed the request would not be made if they had them at hand); and to require a bill

> of particulars in support of the request when from the nature of the situation counsel cannot know such details is to deny the rule itself. That we have not done." 290 F. 2d, at pp. 88-89.

Obviously, a sharper and more patent conflict between Courts of Appeal would be difficult to imagine. In fact, the opinion below even acknowledges that the Second Circuit decisions support petitioner's contention, but makes no attempt to distinguish or explain away those decisions. In effect, the court is saying "That may be the law in the Second Circuit, but not in the Eighth Circuit".

This conflict, of course, has been apparent for a long period of time; the Eighth Circuit has now chosen to side with the Fifth, Ninth and Tenth Circuits, who have likewise rejected the decisions of the Second Circuit on this issue. Ever since the latter circuit established its strong doctrine requiring *in camera* inspections, these other courts have criticized and disapproved the rule. For example, **Herzog v. United States**, 226 F. 2d 561 (Ninth Cir.) and **Parr v. United States**, 265 F. 2d 894 (5th Cir.), although both involving defense requests for outright production of grand jury testimony, nevertheless contain dicta indicating that even an *in camera* inspection by the court is a discretionary matter. The **Parr** decision specifically notes the conflict between it and the Second Circuit holdings. Then, of course, **Travis v. United States**, 269 F. 2d 928 (10th Cir.), decided **after** the **Pittsburgh Plate Glass Co.** decision, specifically rejects the Second Circuit holdings, relying partially upon the refusal of the Supreme Court to resolve the issue in the **Pittsburgh** case. As noted before, **Travis** was later reviewed after a grant of certiorari but reversed because of improper venue, so again the *in camera* inspection issue was unresolved.

The present conflict between circuits, sharpened by the Eighth Circuit opinion below, is hopelessly irreconcilable.

A convincing academic argument can probably be made in support of either viewpoint and appears in many of the conflicting opinions herein cited. The Second Circuit precedent is buttressed by the fact that the government has never sought certiorari in any of the cases it lost on this issue; on the other hand, the opposing viewpoint has the support of a greater number of circuits (although the Second has by far the greater number of decisions). To further complicate matters, the Supreme Court granted certiorari in the only two cases which **directly** held against the mandatory *in camera* inspection, **Travis** and **Pittsburgh Plate Glass Co.** But the trial court at the district level must decide these matters consistent with the decisions of its particular circuit, regardless of the Second Circuit, or "majority," or "better" rule. Hence, at present a defendant in the Second Circuit can prepare his case with complete assurance that chief prosecuting witnesses can be impeached if they depart from grand jury testimony. Defendants in the Fifth, Ninth and Tenth Circuits (and now the Eighth Circuit) can expect to be denied any such benefit. Defendants in other circuits can only speculate as to their prospects on the issue, probably with the same degree of accuracy (or chance of correctly predicting the outcome) as they could derive from the toss of a coin.

Only a review and resolution of the issue by the Supreme Court can now end this hopeless conflict and uncertainty in this most vital field of criminal procedure..

3. Even apart from the manifest disagreement among the circuits, and now particularly between the Eighth and Second Circuits, the fair and orderly administration of justice requires a pronouncement from this Court on the issue of *in camera* inspection of grand jury testimony.

This is not a novel or rare issue. It is one which is raised frequently, in virtually every federal criminal trial involv-

ing a critical conflict of testimony. Much can be said in favor of the mandatory *in camera* inspection; on the other hand, petitioner recognizes and appreciates the substantial objections to such a procedure. But regardless of which viewpoint one favors, it cannot be disputed that this issue, now riddled with controversy, is of paramount importance and should be resolved by our highest court.

Each month which passes while this matter remains a puzzle will see dozens of defendants facing juries in legal battles for freedom; many will be denied the benefit which petitioner sought in vain in his trial below. How many who are convicted might have been liberated had their trials taken place in the Second Circuit? This, of course, no one can speculate. Nevertheless, it is a certainty that the instant issue will be raised in many, if not most, of these trials, and that the present status of the law offers little to the trial court and the litigants in the way of reliable guidance.

The uniform and fair administration of justice, particularly in felony prosecutions, requires that the issue be ultimately decided for **all** federal courts with all due dispatch. This can be accomplished best by a review of the instant case by the United States Supreme Court.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari in the above cause should be granted.

Respectfully submitted.

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Opinion.

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 16,752.

Charles Edward Anderson Berry, Appellant,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[October 27, 1961.]

Before SANBORN, MATTHES and RIDGE, Circuit Judges.

SANBORN, Circuit Judge.

This is the second appearance of Charles Edward Anderson Berry as an appellant in this Court. He was, on December 23, 1959, charged by indictment with having knowingly transported in interstate commerce from El Paso, Texas, to St. Louis, Missouri, a girl known as Janice Norine Escalanti, with intent to induce her to engage in immoral practices, a violation of 18 U.S.C. § 2421. Berry entered a plea of not guilty, was tried to a jury, found guilty, and on March 11, 1960, sentenced to five years imprisonment and to pay a fine of $5,000. He appealed from that judgment, asserting that the evidence was insufficient to establish the intent necessary to make his admitted transportation of the girl a criminal offense. He also contended that he did not have a fair trial be-

cause of prejudicial remarks and conduct of the trial judge, and that the court erred in its instructions to the jury. This Court held that, under the evidence, the question of Berry's intent was one of fact for the jury, and that the instructions of the trial court as a whole were "adequate, fair and accurate." We held, however, that the attitude of the judge, as evidenced by some of his remarks during the trial, made the trial unfair. We vacated the judgment appealed from, and remanded the case for a new trial. *Berry* v. *United States*, 283 F.2d 465.

The case has now been retried before a different jury and a different judge. The instructions given the jury were the same as those we held to be adequate, fair and accurate on Berry's original appeal. The jury returned a verdict of guilty, and from a sentence of imprisonment for a period of three years and a fine of $5,000, Berry has appealed. He does not challenge the sufficiency of the evidence. He challenges the validity of one of the court's instructions, which it is asserted would have permitted the jury to convict him if they found that he had committed a "sexual act" with the girl not amounting to debauchery or an immoral practice. Considering the court's instructions as a whole, we are still of the opinion that they were adequate, fair and accurate. We shall say no more about that question.

The only other error that is asserted is the refusal of the trial court to make a private inspection of the grand jury testimony of Janice Escalanti, the chief government witness, to discover whether there were inconsistencies between that testimony and her testimony at the trial which should be made available to defendant's counsel for purposes of impeachment.

The controverted issue in this case was a simple one: Did Berry transport the girl for the purpose of having sexual intercourse with her, as the Government's evidence

indicated, or did he transport her in order to furnish her legitimate employment at his night club in St. Louis as a hat check girl, as he testified?

The facts which gave rise to the charge against Berry are, in large part, undisputed. Berry was a musician, singer and entertainer. He and his band, consisting of three musicians, were on an entertainment tour, traveling in his Cadillac automobile from one engagement to another. One of the places at which they performed was El Paso, Texas, on December 1, 1959. There Berry met Janice Norine Escalanti, a fourteen-year-old Apache Indian girl, with an eighth grade education. She worked in El Paso as a waitress and engaged in prostitution. Berry offered her a job as a hat check girl in his night club in St. Louis. She sold photographs for him during his performance in El Paso. She accepted his offer of employment and his invitation to join him for the remainder of the tour and to sell photographs at his performances. After the engagement at El Paso on December 1, 1959, Berry, his band and the girl left for Tucson, Arizona, where they arrived in the daytime of December 2. There he procured two adjoining rooms at a motel—one for the band and the other for himself and the girl. Each room contained two double beds. The girl and Berry occupied the same room while in Tucson. The band had the adjoining room. She sold pictures at the performance there on the evening of December 2. From Tucson the party drove to Phoenix, Arizona, for a performance, and thence to Santa Fe, New Mexico, for another. From Santa Fe they drove to Denver, Colorado. Berry registered on December 5, 1959, at the Drexel Hotel for the room he and the girl were to occupy, as "Mr. and Mrs. Janet Johnson." That room had one bed. The room was occupied by Berry and the girl while they were in Denver. From Denver the group drove to Pueblo, Colorado, for another performance. After that perform-

ance, they drove to Kansas City, Missouri, where Berry took a plane to St. Louis. The girl and the band arrived at St. Louis by the automobile that same evening. When they reached St. Louis, the girl was driven to Berry's house. She was taken by him to the night club and introduced to Francine Gillium, the manager of the club, at whose home the girl was to stay. On or about December 18, Berry told the girl she would have to leave because her work was unsatisfactory. At his direction, she packed up her clothes in a plain paper bag. Berry drove her to the bus station, bought her a ticket to El Paso, Texas, and gave her $5.00. She had told him that she wanted to go to Yuma. Berry did not remain at the station with her until her bus arrived. While waiting for the bus after he left her, she changed her mind about leaving St. Louis. She visited the night club that evening. Berry took the bus ticket from her purse. On December 22, she called the police at Yuma, Arizona. She had no means for going to El Paso or Yuma. She was told by the Yuma police to stay and wait for the St. Louis police to come for her. The St. Louis police arrested her and Berry, and took them to the police station.

The girl testified at the trial that during the trip from El Paso to St. Louis, she and Berry had sexual intercourse a number of times; that they slept in the same bed in their motel room in Tucson; that on their journey from Tucson, Arizona, to Denver, Colorado, Berry had intercourse with her on two occasions in the back seat of the automobile; that at the Drexel Hotel in Denver, where she and Berry occupied the same room, with the one bed, he had intercourse with her; and that while she was living at the home of Francine Gillium in St. Louis, Berry had intercourse with her frequently.

While Berry admitted having transported the girl on his tour from El Paso, having occupied the same room

with her in Tucson and in Denver, having arranged to have her stay with Francine Gillium in St. Louis, and having called at the Gillium home on occasions, he denied having had sexual intercourse with Janice Escalanti at any time.

At the trial, Berry, who testified in his own behalf, was asked, "What was your purpose in bringing Janice from Texas to Missouri?" His answer was, "She needed a job and I had a job for her in the club."

At the conclusion of the direct examination of Janice Escalanti, counsel for Berry requested that the Government furnish the defense, for purposes of impeachment, all statements made by her to Government officers, and also requested that the Government present to the court, for its private examination, the minutes and the record of her testimony before the grand jury, so that the court could ascertain whether they contained impeaching or contradictory matter. The trial court sustained the motion for the production by the Government of the statements requested, but refused to examine the grand jury minutes or record of the testimony of Janice Escalanti, to search for matter to be used for impeachment of her trial testimony.

To support the contention that the refusal by the court to make a private examination of the grand jury testimony of Janice Escalanti was reversible error, counsel for Berry rely mainly upon the decisions of the Court of Appeals for the Second Circuit. *United States* v. *Spangelet*, 258 F.2d 338; *United States* v. *Hernandez*, 282 F.2d 71; and *United States* v. *Hernandez*, 290 F.2d 86.

In *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 681, 682, the Supreme Court, referring to the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts," said:

"• • • This 'indispensable secrecy of grand jury proceedings,' *United States* v. *Johnson*, *supra* [319 U.S. 503], at 513, must not be broken except where there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity."

In *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400-401, the Supreme Court said:

"• • • This Court has long held that there are occasions, see *United States* v. *Procter & Gamble*, *supra* [356 U.S. 677], at 683, when the trial judge may in the exercise of his discretion order the minutes of a grand jury witness produced for use on his cross-examination at trial. Certainly 'disclosure is wholly proper where the ends of justice require it.' *United States* v. *Socony-Vacuum Oil Co.*, *supra* [310 U.S. 150], at 234.

"The burden, however, is on the defense to show that 'a particularized need' exists for the minutes which outweighs the policy of secrecy. We have no such showing here. As we read the record the petitioners failed to show any need whatever for the testimony of the witness Jonas. They contended only that they had a 'right' to the transcript because it dealt with subject matter generally covered at the trial. Petitioners indicate that the trial judge required a showing of contradiction between Jonas' trial and grand jury testimony. Such a preliminary showing would not, of course, be necessary. While in a colloquy with counsel the judge did refer to such a requirement, we read his denial as being based on the breadth of petitioners' claim. Petitioners also claim error because the trial judge failed to examine the transcript himself for any inconsistencies. But we need not consider that problem because petitioners made no such request of the trial judge. The Court of Appeals apparently was of the view that even if

> the trial judge had been requested to examine the transcript he would not have been absolutely required to do so. It is contended here that the Court of Appeals for the Second Circuit has reached a contrary conclusion. *United States* v. *Spangelet*, 258 F.2d 338. Be that as it may, resolution of that question must await a case where the issue is presented by the record. The short of it is that in the present case the petitioners did not invoke the discretion of the trial judge, but asserted a supposed absolute right, a right which we hold they did not have. * * *"

In the opinion of the Court of Appeals for the Fourth Circuit in the case of *Pittsburgh Plate Glass Company* v. *United States*, 260 F.2d 397 (affirmed by the Supreme Court), the obvious drawbacks of compelling trial judges to inspect the grand jury minutes of the testimony of a witness, in an attempt to ferret out possible inconsistencies, are accurately pointed out. See, also, and compare, *Travis* v. *United States*, 10 Cir., 269 F.2d 928, 945; *Herzog* v. *United States*, 9 Cir., 226 F.2d 561, 567.

In the instant case, it is inconceivable to us that there was any reason why the trial judge, in the interests of justice, shall be compelled to examine the transcript of the testimony of Janice Escalanti before the grand jury. The defense had the statements she had given to the Federal Bureau of Investigation and to the St. Louis police. She was cross-examined at the trial in minute detail as to material, as well as inconsequential, matters about which she testified. As we have said, there was no dispute as to Berry having transported her. The only controverted question was whether he had had immoral relations with her on the trip from El Paso to St. Louis and after reaching St. Louis, as she testified at the trial. There was no reason whatever to suspect that her grand jury testimony had differed in any material respect from that which she gave at the trial with regard to Berry's relations with

her. There was no compelling necessity for the examination by the court, privately or otherwise, of her testimony before the grand jury. Obviously, no indictment would have been returned unless she had testified before the grand jury that she had had immoral sexual relations with Berry. We are convinced that the trial judge did not abuse his discretion in refusing to examine her grand jury testimony in a hunt for possible inconsistencies. His refusal, in our opinion, was neither erroneous, prejudicial nor an abuse of his discretion.

The judgment appealed from is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals Eighth Circuit.

Judgment.

United States Court of Appeals
For the Eighth Circuit.

No. 16,752 September Term, 1961.

Charles Edward Anderson Berry,	Appellant,	Appeal from the United States District Court for the Eastern District of Missouri.
vs.		
United States of America.		

This case came on to be heard on the original files of the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Judgment and Sentence

of the said District Court appealed from in this cause be, and it is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Charles Edward Anderson Berry, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

October 27, 1961.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 568

CHARLES EDWARD ANDERSON BERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 15–22) is reported at 295 F. 2d 192.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1961. The petition for a writ of certiorari was filed on November 22, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in the circumstances of this case the trial judge properly exercised his discretion in declining

to look at the grand jury testimony of the complaining witness in order to search for possible impeaching material.

STATEMENT

Petitioner was convicted by a jury in the District Court for the Eastern District of Missouri on a one-count indictment charging him with interstate transportation of a girl for immoral purposes in violation of 18 U.S.C. 2421 (I R. 1, 32).[1] He was sentenced to imprisonment for three years and fined $5,000 (I R. 41). On appeal, the conviction was unanimously affirmed (III R. 1–8).[2]

1. *The Crime.*—Petitioner met Janice Escalanti in Juarez, Mexico, on December 1, 1959 (II R. 15). At that time, Miss Escalanti was a fourteen-year-old Indian who had received an eighth-grade education on a reservation (II R. 14–15). Petitioner was on tour with a small band as a "rock and roll" singer (II R. 24). Miss Escalanti told petitioner that she was twenty-one years of age and had been a prostitute and would like to reform (II R. 21, 57). Petitioner offered her a job as a "hat check" girl in his club

[1] The record consists of three separately numbered volumes. Volume I, which will be designated as "I R.," contains the district court proceedings. Volume II, which will be designated as "II R.," is the trial transcript. Volume III, which will be designated as "III R.," contains the proceedings in the court of appeals.

[2] This was the second trial. The first conviction was reversed by the court of appeals because of the attitude of the trial judge toward petitioner. *Berry* v. *United States*, 283 F. 2d 465, certiorari denied, 364 U.S. 934. The second trial was before a different judge (I R. 29, 53–54).

in St. Louis (II R. 21). Petitioner transported Miss Escalanti in his car from El Paso, Texas (II R. 18–19), to Tucson, Arizona (II R. 25), to Phoenix, Arizona (II R. 35), to Santa Fe, New Mexico (II R. 36), to Denver, Colorado (II R. 37), to Pueblo, Colorado (II R. 42), and to St. Louis, Missouri, by way of Kansas City (II R. 42, 44).

During this trip petitioner had intercourse with the girl at the hotel or motel stops (II R. 29–30, 34, 41) and also in the car between cities (II R. 36–38). While working at petitioner's club in St. Louis, Miss Escalanti stayed with a Miss Francine Gillium, who managed the club (II R. 46, 293). During this stay at St. Louis, petitioner had intercourse with Miss Escalanti every night (II R. 48). On December 18, 1959, petitioner bought Miss Escalanti a bus ticket to El Paso, Texas, gave her $5, and left her at the bus station (II R. 48–49). She wanted to go to Yuma where she had previously lived with her grandmother and father but petitioner would give her a ticket only to El Paso (II R. 50, 15). She met a man who bought her some drinks (II R. 51), and did not depart on the bus. When she reappeared at petitioner's club in St. Louis that night, he took the bus ticket from her (II R. 51). She stayed in town until on December 22 she called the Yuma police, who told her to wait until the St. Louis police picked her up (II R. 52–54).

The government corroborated Miss Escalanti's testimony by various witnesses. A bellboy in Tucson, Arizona, testified that, when delivering food, he saw Miss Escalanti in bed, petitioner clad with only a

pair of slacks, and the other bed in the room still made up (II R. 119–122). One of the musicians on the tour testified that petitioner occupied a room with Miss Escalanti on the tour (II R. 153, 160) and that only one of two beds in that room had been slept in (II R. 156). Another musician on the tour (II R. 182) testified that Miss Escalanti stayed in petitioner's room at various stops (II R. 185; see also II R. 187–188). A hotel clerk in Denver testified that petitioner registered in one room with one bed as "Mr. and Mrs. Janet Johnson" (II R. 197–199) and occupied the room with Miss Escalanti (II R. 201; see also II R. 205–206).

Petitioner admitted transporting Miss Escalanti and occupying the same rooms with her but denied having intercourse (II R. 241–242, 244, 246, 248, 251–252, 257–258).

2. *The Request for Inspection of Grand Jury Minutes.*—At the conclusion of Miss Escalanti's direct testimony, petitioner's counsel requested that the government produce any statements she had given the government and also that the trial court examine the grand jury minutes in camera to see "if there is any impeaching or contradictory matter therein" (II R. 54–55). The court sustained the motion as to the statements but declined to inspect the grand jury minutes (II R. 55–56). The government supplied petitioner's counsel with two signed statements which had been taken by the F.B.I. (II R. 56).[1]

[1] Petitioner's counsel also had available the trial transcript of the first trial (II R. 94–96, 101, 105–106, 141–143), as well as information from statements Miss Escalanti had made to the St. Louis police (II R. 83, 127).

The following day, petitioner's counsel renewed the request for inspection by the trial judge of the grand jury minutes "to ascertain if there is any impeaching matter therein * * *" (II R. 178). The government noted that no reference to grand jury testimony had been made by either party during the examination of the witness (II R. 179). The trial judge denied the request (II R. 179), stating that he did not know whether it had been transcribed, but that, in any event, he was not going to review it. He further stated (II R. 179–180):

> In my opinion, I thought she told a pretty straight story. I mean, there's some trivial matters in there, of course, that's a matter for the jury * * *. I didn't see any glaring inaccuracies in the statement she gave you. This woman was on the stand for the equivalent of over half a day, and over and over, and repeated over and over, the same thing. Of course, I'm sure on any witness you're going to find some minor differences, but, generally speaking, I thought the story she told to the prosecution was substantially what she told you.

Subsequently, during argument on petitioner's motion for a new trial, the judge suggested that in at least half the criminal cases no notes of the testimony before the grand jury are taken (II R. 393). The government's view was that notes were not taken in seventy-five percent of the cases (II R. 394).

The court of appeals held that (III R. 7–8) "[i]n the instant case, it is inconceivable to us that there was any reason why the trial judge, in the interests

of justice, shall be compelled to examine the transcript of the testimony of Janice Escalanti before the grand jury." The court noted that the complaining witness was minutely cross-examined on the basis of statements she made to the F.B.I. and the St. Louis police; that there was no dispute as to the transportation; and that the only controverted issue was whether petitioner had sexual relations with her on the trip. On this issue the court said that there was no reason to suspect that the grand jury testimony would differ in any material respect from the trial testimony as no indictment would have been returned unless the girl testified that she had had sexual relations with petitioner. The court concluded that there was no abuse of discretion in refusing to examine grand jury testimony "in a hunt for possible inconsistencies" (III R. 8).

ARGUMENT

Petitioner claims that the trial court, whenever requested by the defense, must look at grand jury testimony for material which may impeach an important government witness. It is the government's position that there is no such automatic rule, and that, in this particular case, the refusal by the judge to stop the trial and to search the transcript of the grand jury proceedings for impeaching material was proper.

Rule 6(e) of the Federal Rules of Criminal Procedure, which was promulgated by this Court in 1946 after approval by Congress, committed the disclosure of grand jury minutes to the discretion of the trial

court in conformity with the traditional practice. Subsequently, Congress in enacting the so-called "Jencks" statute, 18 U.S.C. 3500, indicated its opposition to having the trial judge automatically turn over grand jury minutes after a witness has testified, by sharply criticising the decision (*United States* v. *Rosenberg*, 245 F. 2d 870 (C.A. 3)) in which such production had been ordered. See S. Rep. No. 981, 85th Cong., 1st Sess., pp. 3, 10; 103 Cong. Rec. 15933. Both the majority and minority opinions of this Court in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400, 403–404, recognized that production of grand jury minutes was controlled by Rule 6(e) and was not required by the "Jencks" Act.[4]

Moreover, as we read the *Pittsburgh Plate Glass Co.* decision, the whole Court agreed that, before grand jury minutes should be ordered turned over to the defense, a particularized need must be shown; the majority and minority differed only as to the application of the rule to the facts of that case. The Court did not decide whether, preliminarily, the judge must look at the testimony of a witness in order to decide whether his grand jury testimony must be turned over. We think, however, that it is implicit in the *Pittsburgh Plate Glass* ruling that

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[4] It has long been recognized that different considerations control the production of grand jury minutes from those concerning the production of government documents. Compare the late Judge Hand's comments on the production of grand jury minutes in *United States* v. *Garsson*, 291 Fed. 646, 649 (S.D. N.Y.), and of government documents in *United States* v. *Andolschek*, 142 F. 2d 503, 506 (C.A. 2).

where, on the facts of a given case, no particularized need for the grand jury testimony of a witness is shown, the trial judge is not required to examine the grand jury testimony of the witness merely to determine whether there might be some inconsistencies with his testimony at the trial. *Jackson* v. *United States,* No. 16,342, C.A. D.C., decided November 2, 1961; *Pittsburgh Plate Glass Co.* v. *United States,* 260 F. 2d 397 (C.A. 4), affirmed without deciding this issue, 360 U.S. 395; *Parr* v. *United States,* 265 F. 2d 894 (C.A. 5), reversed on other grounds, 363 U.S. 370; *Travis* v. *United States,* 269 F. 2d 928 (C.A. 10), reversed on other grounds, 364 U.S. 631.

In this case, there was no particularized need for the grand jury testimony and therefore no occasion to require the judge to look at the minutes to evaluate their worth for impeachment. The only material fact in issue at petitioner's trial was whether petitioner had intercourse with a fourteen-year-old girl. As the court of appeals noted, it was "inconceivable" that this would be controverted by the girl's testimony before the grand jury since otherwise no indictment would have been returned. Moreover, the trial record shows only inconsequential deviations in this young girl's testimony despite extensive cross-examination based not only on her prior statements to the F.B.I. and St. Louis police, but also on a full transcript of her testimony in a previous trial.

It is true, as petitioner indicates, that the Court of Appeals for the Second Circuit has taken a different approach to the problem. The Second Circuit has held that the trial judge must, on the request of

the defendant, look at the grand jury testimony of any prosecution witness and turn over those parts which contain inconsistencies. *E.g., United States* v. *Giampa,* 290 F. 2d 83, 85 (C.A. 2). The surface conflict of decisions may, however, be explained in part by regional differences in procedure. In New York, grand jury testimony is normally transcribed. On the other hand, except for particular types of investigations—such as antitrust actions—relatively little grand jury testimony is recorded in other parts of the country. The Assistant United States Attorney estimated during petitioner's trial that in the Eastern District of Missouri no notes of grand jury testimony are taken seventy-five per cent of the time (II R. 394) (see the discussion of this difference in practice between New York and the rest of the country in *Federal Rules of Criminal Procedure with Notes and Proceedings of the Institute,* New York University School of Law, 1946, pp. 178–180). Thus, in New York, a rule requiring the judge to examine grand jury testimony on request would apply to every defendant. In other areas, in contrast, there would be marked inequality between defendants—as the trial court suggested in this case (II R. 393)—depending on whether a stenographer happened to be present during the grand jury proceedings. For this reason, we do not think that there is any real conflict between the general Second Circuit rule and that of other circuits, such as to require resolution by this Court. In particular, we submit that any difference between the two rules does not call for resolution in this case

where the grand jury testimony of the girl could have very little significance because (1) petitioner controverted only the narrow issue whether he had had intercourse with her, (2) she was subject to a searching examination at the trial on the basis of her prior statements and testimony, and (3) her trial testimony revealed no need for further probing.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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Solicitor General.

HERBERT J. MILLER, JR.,
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THEODORE GEORGE GILINSKY,
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DECEMBER 1961.

U.S. GOVERNMENT PRINTING OFFICE 1961

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No. 568.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

CHARLES EDWARD ANDERSON BERRY,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF.

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UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF.

ARGUMENT.

The Solicitor-General, in his brief opposing certiorari, concedes that the Eighth Circuit opinion below is in direct and irreconcilable conflict with recent decisions of the Second Circuit:

> "It is true, as petitioner indicates, that the Court of Appeals for the Second Circuit has taken a different approach to the problem. The Second Circuit

> has held that the trial judge must, on the request of the defendant, look at the grand jury testimony of any prosecuting witness and turn over those parts which contain inconsistencies" (Government Brief, pp. 8-9).

This factor alone would seem to warrant certiorari in this case, particularly since the issue involved is highly recurrent in the field of criminal law.

However, the government then attempts to minimize the conflict by explaining that grand jury testimony is normally transcribed in New York whereas relatively little such testimony is recorded "in other parts of the country." Since this assertion is quite beyond the record herein, and does not appear to be founded upon any statutory or decisional law, petitioner (whose counsel's practice and experience has been geographically limited to a narrow midwest area) is not in a position to either affirm or dispute the distinction. Assuming *arguendo* that the government is correct in this observation, it nevertheless appears to have little pertinency to the issue involved. In the first place, the grand jury testimony in the instant case was actually transcribed and in the possession of the assistant district attorney (see Footnote 1, page 7, of Petition for Certiorari). Secondly, neither the Eighth Circuit opinion below (opposing inspection) nor any of numerous Second Circuit decisions (requiring inspection) give even the slightest indication or implication that their respective opinions are influenced by the prevailing practices in regard to transcribing grand jury testimony. Indeed, it seems quite inconceivable that a United States Court of Appeals would formulate a vital procedural rule of law, in direct conflict with other circuits, by relying on some unofficial custom adopted in one of the states within its jurisdiction. The distinction thus offered by the government is far-fetched, and clearly fails to explain or justify the open conflict between the Eighth and Second Circuits.

The balance of the Solicitor General's argument is devoted to an examination of the specific facts and circumstances of the instant case in an effort to demonstrate on the merits that the *in camera* inspection was properly refused. Petitioner had deliberately avoided a discussion of the substantive merits under the impression that a petition for certiorari should not involve legalistic arguments more properly reserved for an actual appeal. Nevertheless, since the government has seen fit to delve into the subject in order to justify the Eighth Circuit opinion, petitioner feels constrained to reply, albeit with brevity.

The basic argument of the government, as well as the Eighth Circuit, is that the grand jury transcript could not possibly have helped the defendant. In this regard, the government lapses into the same error as the Eighth Circuit, for both insist that the only material fact in issue was whether petitioner had intercourse with the female (Govt. Brief, p. 8; Petition for Certiorari, Appendix, p. 21). This is manifestly incorrect. The real, and only, issue was whether the interstate transportation was for an immoral purpose; the intercourse, if proven, is only a circumstance to be considered in determining the over-all nature of the trip. See **Mortensen v. United States**, 322 U. S. 369.

With this in mind, the Court's attention is respectfully directed to the fact that the female prosecuting witness testified at the trial that petitioner had intercourse with her virtually every night from the time they first met—in a Tucson motel room, in the back seat of a moving automobile (at high speed) with three unaware persons in front, in a Denver hotel, and every night in St. Louis at petitioner's secretary's home and in her presence (R. 30, 34, 37, 38, 41, 48, 79). Is it not possible that her grand jury testimony might contain material deviations from such a lengthy and detailed recital? The purpose of checking the grand jury testimony, therefore, was not to

disprove any particular act of intercourse; rather it was to ascertain whether or not this girl of questionable background was telling the **truth**. For example, if this heavily guarded grand jury transcript disclosed that she testified consistent with her trial testimony on some matters, but wholly inconsistent on other material items, the latter factor might influence the jury to disbelieve her entire testimony. Or if her grand jury testimony, given at a time when her memory was most fresh, omitted material matters which she swore to at the trial, the jury could well become skeptical of her honesty. This became all the more crucial when it is remembered that this girl's testimony was the only direct evidence against petitioner. The entire case was primarily her word against his.

Therefore, because many of the facts were not in dispute does not minimize (as the government and Eighth Circuit suggest) the importance of testing the credibility of this chief prosecuting witness; if the jury did not believe her story, as opposed to petitioner's testimony of adamant denial, the petitioner would necessarily have been acquitted.

The second substantive factor urged by the government is that the girl already had been subjected to a searching cross-examination on the basis of prior statements and testimony. This is true, but hardly provides any reason for the trial court to refuse to inspect the grand jury testimony. It is obvious that a witness's grand jury testimony, usually shortly after the defendant's arrest (less than two weeks, in the instant case), is more spontaneous and uninhibited than trial testimony which is presented after interviews and conferences with the prosecuting authorities. Furthermore, the prior statements of the witness in the instant case did reveal some material deviations which should have at least excited the curiosity of the trial judge as to what lay hidden in the otherwise sacrosanct grand jury transcript.

This leads to the government's third and final substantive contention, which is simply that the girl's trial testimony did not reveal any "need for further probing." In this regard, the Solicitor-General is more influenced by the remarks of the trial court (R. 179-180) than by the transcript itself. Although the district judge "thought she told a pretty straight story," the transcript reveals numerous material contradictions (R. 74-76, 82, 83, 109-110). In addition, many parts of her testimony were contradicted by other witnesses for both the government and the defense.[1] She also admitted that a prior written statement she had signed was incorrect (R. 139-140). A discussion of these many inconsistencies and contradictions would serve no useful purpose at this time; petitioner merely desires to point out the government's oversight in claiming that the girl's testimony revealed no reason for further test.

All of these matters now urged by the government have been considered, at one time or another, by the Second Circuit. None has been found to provide a sufficient reason to exempt the trial court from the duty of making an *in camera* inspection (see **United States v. Zborowski**, 271 F. 2d 661 and other cases cited in Petition for Certiorari, p. 10). What the government is now doing is simply opposing certiorari in the instant case by advancing those same arguments which it unsuccessfully urged in the numerous Second Circuit cases. This further demonstrates the present need for certiorari on this issue, for despite numerous rejections by the Second Circuit the government still insists that its arguments possess vitality.

One undeniable fact stands out among all others, and is conceded by the government: if the trial of petitioner

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[1] The witness's testimony as to LeRoy Davis (R. 73) was denied by Davis (R. 174-175). Her testimony concerning a statement to local police (R. 83) was contradicted by the officer himself (R. 331). Her denial of a statement to police (R. 127) was refuted by the officer (R. 328).

had taken place **anywhere** in the Second Circuit, the conviction would have unquestionably been reversed! In the Eighth Circuit, it has been affirmed. This inconsistency must be ultimately resolved, so that the fate and freedom of future defendants will not hinge on such an irrelevant criterion as the geographical situs of the trial.

Respectfully submitted,

.....

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

NO. 568

CHARLES EDWARD ANDERSON BERRY, *Petitioner*

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1961

NO. 568

CHARLES EDWARD ANDERSON BERRY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Charles Edward Anderson Berry, prays that this Court will grant rehearing of its order of January 8, 1962 denying his Petition for Certiorari in the above entitled case and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit in such case, as prayed for in said Petition for Certiorari.

Reasons for Granting Rehearing and Issuing the Writ

1. The indictment avers, inter alia, that petitioner's purpose was to compel, induce and entice prosecutrix "to give herself up to debauchery and to engage in other immoral practices" (R. 3-9). Before petitioner could be legally convicted under these averments there would at least have to be a jury finding that his purpose was to compel, induce or entice prosecutrix "to give herself up to debauchery." But there is no such finding. The verdict implies no such finding because the charge to which the verdict responded did not require the jury, as a condition of convicting petitioner, to make any such finding. All the charge required of the jury, as basis for conviction, was a finding that petitioner transported prosecutrix from El Paso to St. Louis for the purpose of compelling, inducing or enticing her to engage in or complete a sexual act with him and that such purpose was immoral (R. 379). The verdict of guilty, responding to this charge, necessarily presupposes that the jury found that petitioner's only purpose was an immoral purpose to compel, induce or entice prosecutrix to engage in or complete a sexual act with him; whereas, the only jury finding as to his purpose that would satisfy the indictment would have been a finding that it was his purpose to compel, induce or entice prosecutrix "to give herself up to debauchery and to engage in other immoral practices." Thus the essential facts the verdict established as to his purpose are substantially different from the essential facts which the indictment avers with respect to his purpose. In short, the kind of verdict that ought to be in the record as a predicate for the conviction is lacking.

2. We therefore submit that the conviction is not sufficiently supported by the verdict. To allow the conviction to stand in these circumstances would, we respectfully submit, allow petitioner to be deprived of his liberty without the due process of law guaranteed him by the Fifth Amendment of the United States Constitution.

3. The foregoing grounds were not previously presented in the petition for certiorari and are here now submitted in the good faith belief of petitioner and his counsel that such grounds are substantial and warrant a grant of the rehearing here sought and a grant of writ of certiorari to review the judgment of the court below.

Conclusion

For the reasons set forth above and in the Petition for Certiorari it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Attorneys for Petitioner

By_____
Of Counsel

Certificate of Counsel

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

LUTHER E. JONES, JR.
Of Counsel for Petitioner